TABLE OF CONTENTS

	PAGE
Statement of Case	1
Reasons for Not Granting the Writ	2
Arguments and Authorities	3
Conclusion	6

TABLE OF AUTHORITIES

CASES:

Bonahan v. Nebraska, 125 U.S. 692, 31 L.Ed. 854, 8 S.Ct. 1390	3
Camillo Molinara v. New Jersey, 396 U.S. 365, 24 L.Ed. 586, 90 S.Ct. 498	3
Mason v. Askew, 484 F.2d 642 (5th Cir. 1973)	5
Padilla v. Ackerman, 460 F.2d 477 (9th Cir. 1972)	5
Preiser v. Rodriguez, 411 U.S. 475, 36 L.Ed.2d 439, 93 S.Ct. 827	4, 5
Smith v. U. S., 94 U.S. 97, 24 L.Ed. 32	3
U. S. v. Campos-Serrano, 404 U.S. 294	3
U. S. v. Neal, 453 F.2d 344 (10th Cir. 1972)	3

STATUTES:

63 O.S. 1961, §§451, 452	1
42 U.S.C. §1983	5

In the
Supreme Court of the United States
OCTOBER TERM, 1973

No. 73-1655

MYER AARON RUHM,
Petitioner,

VERSUS

BOB TURNER, Sheriff, Oklahoma County, Oklahoma,
and
HON. HEZ J. BUSSEY, Judge, HON. TOM BRETT, Judge,
and
HON. ROBERT D. SIMMS, formerly Judge, Court of Criminal Appeals, State of Oklahoma,
Respondents.

BRIEF OPPOSING CERTIORARI

STATEMENT OF CASE

The petitioner, Myer Aaron Ruhm, hereinafter referred to as the petitioner, was charged, tried, and convicted of the crime of Possession of Marihuana (63 O.S. 1961, §§451, 452) in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-70-2230, and on November 17, 1970, was sentenced to seven (7) years imprisonment and fined Two Thousand Five Hundred Dollars ($2,500). The petitioner then perfected his appeal to the Oklahoma Court of Criminal Appeals which, on April 11, 1972, affirmed the

petitioner's conviction (Appeal No. A-16390). On May 1, 1972, the Court of Criminal Appeals revoked the petitioner's bond.

Thereafter the petitioner filed a petition designated as a Petition for a Writ of Habeas Corpus and/or a Civil Rights Action in the United States District Court for the Western District of Oklahoma (Case No. CIV-72-420). On January 23, 1973, the District Court denied the Petition for a Writ of Habeas Corpus.

An appeal was then taken to the United States Court of Appeals for the Tenth Circuit (No. 73-1259). On February 4, 1974, the Court of Appeals dismissed the case on the grounds that it would entertain the matter as a habeas corpus proceeding, and in view of petitioner's absence from physical custody it would reopen the matter only if the petitioner surrendered himself within thirty (30) days.

The petitioner now seeks a writ of certiorari from this Court.

REASONS FOR NOT GRANTING THE WRIT

When a petitioner does not challenge the incidents of custody, but the very fact of custody itself, then the proper remedy is available only in a habeas corpus proceeding, and if the petitioner is not in fact in custody but is a fugitive from justice then he cannot properly seek relief through a habeas corpus proceeding.

ARGUMENTS AND AUTHORITIES

The respondents respectfully submit that this Honorable Court has previously ruled on the issue herein presented and has consistently held that when one is a fugitive from justice he cannot seek relief through a habeas corpus proceeding. In the case of *Camillo Molinara* v. *New Jersey*, 396 U.S. 365, 24 L.Ed. 586, 90 S.Ct. 498, Molinara was free on bail, but failed to surrender himself to state authorities, and his bond was revoked. In the instant case petitioner's bond was also revoked and he has not surrendered himself to state authorities; consequently the respondents consider the petitioner a fugitive from justice. In *Molinara, supra*, the Court held:

> "No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed on him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claim."

The same decisions were also reached by this Honorable Court in *Bonahan* v. *Nebraska*, 125 U.S. 692, 31 L.Ed. 854, 8 S.Ct. 1390; *Smith* v. *U. S.*, 94 U.S. 97, 24 L.Ed. 32, and *U. S.* v. *Campos-Serrano*, 404 U.S. 294. The Court of Appeals for the Tenth Circuit based its decision on the case of *U. S.* v. *Neal*, 453 F.2d 344 (10th Cir. 1972), which relied heavily on *Molinara, supra*.

For the reason that this issue, as indicated above, has already been decided by this Honorable Court the respondent respectfully submits that this writ be denied.

The remaining question to be considered is whether the relief sought by the petitioner is in the nature of a habeas corpus proceeding, thereby requiring the petitioner be in custody before review of his case may properly be entertained, or it involves a Civil Rights Action.

The respondents respectfully submit that the issue of whether or not an action properly lies in a habeas corpus proceeding or a Civil Rights Action has already been discussed by this Court in the case of *Preiser* v. *Rodriguez*, 411 U.S. 475, 36 L.Ed.2d 439, 93 S.Ct. 827, in which the Court clearly delineated the differences between the two actions. In *Preiser, supra*, this Court indicated that a writ of habeas corpus has been traditionally sought in cases where the petitioner alleges that he is being unlawfully subjected to physical restraint, and that a civil rights action is a proper remedy when a state prisoner is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody.

In the instant case petitioner is not attacking the incidents of custody, but custody itself, even though he is in fact a fugitive from justice and not subjected to any custodial restraint by state authorities. The petitioner simultaneously seeks the relief available to one who has the status of an individual under legal restraint, but at the same time he refuses to surrender himself to state authorities and actually assume the status required to render habeas corpus a proper remedy for him to pursue. The pe-

titioner in essence is attacking the very fact of conviction which resulted in the sentence of physical confinement although he is not physically confined. In *Preiser, supra,* this Court stated:

> ". . . We hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate or speedier release from that imprisonment, his sole Federal remedy is the writ of habeas corpus . . ."

Both the Ninth Circuit and the Fifth Circuit Courts of Appeals have adhered to the guidelines set forth in *Preiser, supra.* In the case of *Padilla* v. *Ackerman,* 460 F.2d 477 (9th Cir. 1972), the Ninth Circuit Court of Appeals held that a "purported civil rights complaint which in essence seeks habeas corpus relief should be treated as an application for a writ of habeas corpus." In the case of *Mason* v. *Askew,* 484 F.2d 642 (5th Cir. 1973), the Fifth Circuit Court of Appeals held that "since appellant challenges not the condition of this confinement, but the fact of imprisonment itself, the United States District Court correctly held that 42 U.S.C. §1983 could not provide the requested remedy in that appellant's Federal relief would have to come in habeas corpus."

The respondents respectfully submit that the relief sought by the petitioner can only be attained through a habeas corpus proceeding, and since the petitioner remains a fugitive from justice he does not have the requisite standing to envoke this Court's jurisdiction in a habeas corpus proceeding.

CONCLUSION

THEREFORE, premises considered, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

LARRY DERRYBERRY
Attorney General of Oklahoma
112 State Capitol Building
Oklahoma City, Oklahoma 73105

MARVIN C. EMERSON
First Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105

Counsel for Respondent

of Counsel:

AMALIJA J. HODGINS
Assistant Attorney General
112 State Capitol Building
Oklahoma City, Oklahoma 73105

July, 1974

CERTIFICATE OF SERVICE

This is to certify that I mailed three copies of the above and foregoing instrument to which this certification is attached, to the following named counsel of record this ..... day of ....., 1974:

Fred P. Gilbert
1401 National Bank of Tulsa Building
Tulsa, Oklahoma 74103
Attorney for Petitioner

.....

MARVIN C. EMERSON